

AMENDED IN ASSEMBLY JULY 9, 2009

AMENDED IN ASSEMBLY JUNE 11, 2009

AMENDED IN SENATE APRIL 13, 2009

**SENATE BILL**

**No. 448**

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**Introduced by Senator Pavley**

February 26, 2009

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An act to add *and repeal* Article 3.7 (commencing with Section 2089.2) ~~to~~ of Chapter 1.5 of Division 3 of the Fish and Game Code, relating to fish and wildlife.

LEGISLATIVE COUNSEL'S DIGEST

SB 448, as amended, Pavley. California State Safe Harbor Agreement Program Act.

Existing law establishes various programs designed to conserve and protect endangered species and wildlife.

Existing law, the California Endangered Species Act (CESA), prohibits a person from importing, exporting, or taking, possessing, purchasing, or selling within the state, any species, or any part or product thereof, that the Fish and Game Commission determines to be an endangered species or a threatened species, with specified exceptions.

This bill would enact the California State Safe Harbor Agreement Program Act (act), which would establish a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Game, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts.

The bill would authorize the department to authorize specified acts that are otherwise prohibited pursuant to the CESA pursuant to a safe harbor agreement entered into under the act.

*The bill would repeal the act on January 1, 2020.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Article 3.7 (commencing with Section 2089.2)  
2 is added to Chapter 1.5 of Division 3 of the Fish and Game Code,  
3 to read:

4  
5 Article 3.7. California State Safe Harbor Agreement Program  
6 Act  
7

8 2089.2. (a) This article shall be known and may be cited as  
9 the California State Safe Harbor Agreement Program Act.

10 (b) The Legislature finds that a key to the goals set forth in this  
11 article of conserving, protecting, restoring, and enhancing  
12 endangered, threatened, and candidate species, is their habitat. A  
13 significant portion of the state's current and potential habitat for  
14 these species exists on property owned by private citizens,  
15 municipalities, tribes, and other nonfederal entities. Conservation  
16 efforts on these lands and waters are critical to help these declining  
17 species. Using a collaborative stewardship approach to these lands  
18 and waters will help ensure the success of these efforts.

19 (c) The purpose of this article is to establish a program that will  
20 encourage landowners to manage their lands voluntarily to benefit  
21 endangered, threatened, or candidate species and not be subject to  
22 additional regulatory restrictions as a result of their conservation  
23 efforts.

24 (d) This article does not relieve landowners of any legal  
25 obligation with respect to endangered, threatened, or candidate  
26 species existing on their land. The program established by this  
27 article is designed to increase species populations, create new  
28 habitats, and enhance existing habitats. Although this increase may  
29 be temporary or long-term, California state safe harbor agreements  
30 shall not reduce the existing populations of species present at the  
31 time the baseline is established by the department.

1     2089.4. As used in this article, the following definitions apply:

2     (a) “Agreement” means a state safe harbor agreement approved  
3 by the department pursuant to this article. “Agreement” includes  
4 an agreement with an individual landowner and a programmatic  
5 agreement.

6     (b) “Baseline conditions” means the existing estimated  
7 population size, the extent and quality of habitat, or both population  
8 size and the extent and quality of habitat, for the species on the  
9 land to be enrolled in the agreement that sustain seasonal or  
10 permanent use by the covered species. Baseline conditions shall  
11 be determined by the department, in consultation with the applicant,  
12 and shall be based on the best available science and objective  
13 scientific methodologies. For purposes of establishing baseline  
14 conditions, a qualified person that is not employed by the  
15 department may conduct habitat surveys, if that person has  
16 appropriate species expertise and has been approved by the  
17 department.

18     (c) “Department” means the Department of Fish and Game,  
19 acting through its director or his or her designee.

20     (d) “Landowner” means any person or nonstate or federal entity  
21 or entities that lawfully hold any interest in land or water to which  
22 they are committing to implement the requirements of this article.

23     (e) “Management actions” means activities on the enrolled land  
24 or water that are reasonably expected by the department to provide  
25 a net benefit to the species or their habitat, or both.

26     (f) “Monitoring program” means a program established or  
27 approved by the department in accordance with subdivision (f) of  
28 Section 2089.6.

29     (g) “Net conservation benefit” means the cumulative benefits  
30 of the management activities identified in the agreement that  
31 provide for an increase in a species’ population or the enhancement,  
32 restoration, or maintenance of covered species’ suitable habitats  
33 within the enrolled property. Net conservation benefit shall take  
34 into account the length of the agreement, any offsetting adverse  
35 effects attributable to the incidental taking allowed by the  
36 agreement, and other mutually agreed upon factors. Net  
37 conservation benefits shall be sufficient to contribute either directly  
38 or indirectly to the recovery of the covered species. These benefits  
39 include, but are not limited to, reducing fragmentation and  
40 increasing the connectivity of habitats, maintaining or increasing

1 populations, enhancing and restoring habitats, and buffering  
2 protected areas.

3 (h) “Programmatic agreement” means a state safe harbor  
4 agreement issued to a governmental or nongovernmental program  
5 administrator. The program administrator for a programmatic  
6 agreement shall work with landowners and the department to  
7 implement the ~~agreement~~ and agreement. *The program*  
8 *administrator and the department* shall be responsible for ensuring  
9 compliance with the terms of the agreement.

10 (i) “Qualified person” means a person with species expertise  
11 who has been approved by the department.

12 (j) “Return to baseline” means, at the termination of an  
13 agreement, activities undertaken by the landowner to return the  
14 species population or extent or quality of habitat to baseline,  
15 excluding catastrophic events such as floods, unplanned fires, or  
16 earthquakes, and other factors mutually agreed upon prior to permit  
17 issuance and that are beyond the control of the landowner.

18 2089.6. In addition to the other provisions of this article, the  
19 department may authorize acts that are otherwise prohibited  
20 pursuant to Section 2080 through an agreement, including a  
21 programmatic agreement, if all the following conditions are met:

22 (a) The department receives a complete application containing  
23 all of the information described in Section 2089.8.

24 (b) The take is incidental to an otherwise lawful activity.

25 (c) The department finds that the implementation of the  
26 agreement is reasonably expected to provide a net conservation  
27 benefit to the species listed in the application. This finding shall  
28 be based, at a minimum, upon the determination that the agreement  
29 is of sufficient duration and has appropriate assurances to realize  
30 these benefits.

31 (d) The take authorized by the agreement will not jeopardize  
32 the continued existence of the species. This determination shall  
33 be made based on the provisions of subdivision (c) of Section  
34 2081.

35 (e) The department finds that the landowner has agreed, to the  
36 maximum extent practicable, to avoid or minimize any incidental  
37 take authorized in the agreement, including returning to baseline.

38 (f) The department has established or approved a monitoring  
39 program, based upon objective scientific methodologies, to provide  
40 information for the department to evaluate the effectiveness and

1 efficiency of the agreement program, including whether the net  
2 conservation benefits set forth in the agreement are being achieved  
3 and whether the participating landowner is implementing the  
4 provisions of the agreement.

5 (g) The department has determined that ~~there is~~ sufficient  
6 funding *is ensured*, for it or its contractors or agents, to determine  
7 baseline conditions on the property, *and that there is sufficient*  
8 *funding* for the landowner to carry out management actions; and  
9 for monitoring for the duration of the agreement.

10 (h) Implementation of the agreement will not be in conflict with  
11 any existing department-approved conservation or recovery  
12 programs for the species covered by the agreement.

13 2089.8. The landowner shall submit all of the following:

14 (a) A detailed map depicting the land proposed to be enrolled  
15 in the agreement.

16 (b) The common and scientific names of the species for which  
17 the landowner requests incidental take authorization.

18 (c) A detailed description of the landowner's current land and  
19 water *use and* management practices that affect ~~the habitat of~~ the  
20 covered species, *and the habitat of the covered species*, for which  
21 the landowner requests incidental take authorization.

22 (d) A detailed description of the landowner's future ~~uses of land~~  
23 ~~or water~~ *land and water use and* management practices that *may*  
24 affect ~~the habitat of~~ the covered species, *and the habitat of the*  
25 *covered species*, for which the landowner requests incidental take  
26 authorization. This description shall be used only for informational  
27 and planning purposes.

28 (e) The proposed duration of the agreement that is sufficient to  
29 provide a net conservation benefit to the species covered in the  
30 permit and an explanation of the basis for this conclusion.

31 (f) A detailed description of the proposed management actions  
32 and the timeframe for implementing them.

33 (g) A description of the possible incidental take that may be  
34 caused by the management actions and of the anticipated species  
35 populations and habitat changes over the duration of the permit.

36 (h) A detailed description of the proposed monitoring program.

37 (i) *Any other information that the department may reasonably*  
38 *require in order to evaluate the application.*

39 2089.9. (a) *As used in this section, "proprietary information"*  
40 *means information that is all of the following:*

1     (1) *Related to an agricultural operation or land that is a part*  
2 *of an agricultural operation.*

3     (2) *A trade secret, or commercial or financial information, that*  
4 *is privileged or confidential, and is identified as such by the person*  
5 *providing the information to the department.*

6     (3) *Not required to be disclosed under any other provision of*  
7 *law or any regulation affecting the land or the agricultural*  
8 *operation on the land.*

9     (b) *Proprietary information received by the department pursuant*  
10 *to Section 2089.8 is not public information, and the department*  
11 *shall not release or disclose the proprietary information to any*  
12 *person, including any federal, state, or local governmental agency,*  
13 *outside of the department.*

14     (c) *Notwithstanding subdivision (b), the department may release*  
15 *or disclose proprietary information received pursuant to Section*  
16 *2089.8 to the following entities under the following circumstances:*

17     (1) *Any person or federal, state, or local governmental agency,*  
18 *to enforce this article.*

19     (2) *Any person or federal, state, or local governmental agency*  
20 *working in cooperation with the department to provide technical*  
21 *or financial assistance for the purposes of implementing the*  
22 *program established by this article.*

23     (3) *Any entity, to the extent that the owner, operator, or producer*  
24 *has consented to the release or disclosure.*

25     (4) *The general public, if the information has been transformed*  
26 *into a statistical or aggregate form without identifying any*  
27 *individual owner, operator, or producer, or the specific location*  
28 *from which the information was gathered.*

29     2089.10. If an agreement has been approved and the department  
30 finds that the agreement is being properly implemented, the  
31 department shall allow the landowner to alter or modify the  
32 enrolled property, even if that alteration or modification will result  
33 in the incidental take of a listed species, to the extent that the  
34 alteration or modification returns the species to baseline conditions.

35     2089.12. (a) Unless the department determines that it is  
36 inappropriate to do so based on the nature of the management  
37 actions being proposed, the species listed in the permit, or other  
38 factors, the agreement shall require that the landowner provide the  
39 department with at least 60 days advance notice of any of the  
40 following:

1 (1) Any incidental take that is anticipated to occur under the  
2 agreement.

3 (2) The landowner's plan to return to baseline at the end of the  
4 agreement.

5 (3) Any plan to transfer or alienate the landowner's interest in  
6 the land or water.

7 (b) (1) If the department receives any notice described in  
8 subdivision (a), the landowner shall provide the department, its  
9 contractors, or agents with access to the land or water for purposes  
10 of safely removing or salvaging the species.

11 (2) The department shall provide notice to the landowner at  
12 least seven days prior to accessing the land or water for the  
13 purposes of paragraph (1). The notice shall identify each person  
14 selected by the department, its contractors, or agents to access the  
15 land or water.

16 (3) Notwithstanding paragraph (1), during the seven-day notice  
17 period, a landowner may object, in writing, to a person selected  
18 to access the land or water. If a landowner objects, another person  
19 shall be selected by the department, its contractors, or agents, and  
20 notification shall be provided to the landowner pursuant to  
21 paragraph (2). However, if a landowner objects to a selection on  
22 two successive occasions, the landowner shall be deemed to  
23 consent to access to the land or water by a person selected by the  
24 department, its contractors, or agents. Failure by a landowner to  
25 object to the selection within the seven-day period shall be deemed  
26 consent to access-a *the* land or water by ~~the~~ a person selected by  
27 the department, its contractors, or agents.

28 (4) *If the landowner objects to a person selected to access the*  
29 *land or water pursuant to paragraph (3), the 60-day notice period*  
30 *described in subdivision (a) shall be tolled for the period between*  
31 *the landowner's objection to a person selected for access to the*  
32 *land or water and the landowner's consent to a person selected*  
33 *for access to the land or water.*

34 2089.14. An agreement may be amended with the mutual  
35 consent of the landowner and the department.

36 2089.16. If a landowner seeks to sell, transfer, or otherwise  
37 alienate the land or water enrolled in the agreement during the  
38 term of the agreement, the person or entity assuming that interest  
39 in the property shall (a) assume the existing landowner's duties  
40 under the agreement, (b) enter into a new agreement with the

1 department, or (c) withdraw from an existing agreement under the  
2 terms provided in the agreement, as approved by the department.

3 2089.18. The suspension and revocation of the agreement shall  
4 be governed by suspension and revocation regulations adopted by  
5 the department.

6 2089.20. (a) This section does not provide the public a right  
7 of entry onto the enrolled land or water. The landowner shall  
8 provide the department, its contractors, or agents with access to  
9 the land or water proposed to be enrolled in the agreement to  
10 develop the agreement, determine the baseline conditions, monitor  
11 the effectiveness of management actions, or safely remove or  
12 salvage species proposed to be taken.

13 (b) The department shall provide notice to the landowner at  
14 least seven days before accessing the land or water for the purposes  
15 of subdivision (a). The notice shall identify each person selected  
16 by the department, its contractors, or agents to access the land or  
17 water.

18 (c) Notwithstanding subdivision (a), during the seven-day notice  
19 period, a landowner may object, in writing, to a person selected  
20 to access the land or water. If a landowner objects, another person  
21 shall be selected by the department, its contractors, or agents, and  
22 notification shall be provided to the landowner pursuant to  
23 subdivision (b). However, if a landowner objects to a selection on  
24 two successive occasions, the landowner shall be deemed to  
25 consent to access to the land or water by a person selected by the  
26 department, its contractors, or agents. Failure by a landowner to  
27 object to the selection within the seven-day *notice* period shall be  
28 deemed consent to access the land or water by a person selected  
29 by the department, its contractors, or agents.

30 (d) (1) *Notwithstanding any other law, the landowner is not*  
31 *required to do either of the following:*

32 (A) *Maintain enrolled land or water, or land or water proposed*  
33 *to be enrolled in an agreement, in a condition that is safe for*  
34 *access, entry, or use by the department, its contractors, or agents*  
35 *for purposes of providing access pursuant to subdivision (a).*

36 (B) *Provide to the department, its contractors, or agents, any*  
37 *warning of a hazardous condition, use, structure, or activity on*  
38 *enrolled land or water, or land or water proposed to be enrolled*  
39 *in an agreement, for purposes of providing access pursuant to*  
40 *subdivision (a).*



1     (2) *Notwithstanding any other law, the landowner shall not be*  
2 *liable for any injury, and does not owe a duty of care, to the*  
3 *department, its contractors, or agents resulting from any act or*  
4 *omission described in subparagraph (A) or (B) of paragraph (1).*

5     (3) *The provision of access to land pursuant to subdivision (a)*  
6 *shall not be construed as any of the following:*

7         (A) *An assurance that the land or water is safe.*

8         (B) *A grant to the person accessing the land or water of a legal*  
9 *status for which the landowner would owe a duty of care.*

10        (C) *An assumption of responsibility or liability for any injury*  
11 *to a person or property caused by any act of the person to whom*  
12 *access to the land or water is provided.*

13     (4) *Notwithstanding paragraphs (1) to (3), inclusive, this*  
14 *subdivision shall not be construed to limit a landowner's liability*  
15 *for an injury under either of the following circumstances:*

16         (A) *Willful or malicious failure to guard or warn against a*  
17 *dangerous condition, use, structure, or activity on the land or*  
18 *water.*

19         (B) *Express invitation to a person by the landowner to access*  
20 *the land or water, in a manner that is beyond the access required*  
21 *to be provided pursuant to subdivision (a).*

22     (e) *Nothing in this section creates a duty of care or a ground*  
23 *of liability for injury to person or property.*

24     2089.22. (a) If a federal safe harbor agreement has been  
25 approved pursuant to applicable provisions of federal law and the  
26 federal safe harbor agreement contains species that are endangered,  
27 threatened, or are candidate species pursuant to this chapter, no  
28 further authorization or approval is necessary under this article for  
29 any person authorized by that agreement to take the species  
30 identified in and in accordance with the federal Safe Harbor  
31 Agreement, if that person and the department follow all of the  
32 procedures specified in Section 2080.1, except that the  
33 determination of consistency shall be made by the department  
34 based only on the issuance criteria contained in this article.

35     (b) The department may adopt nonregulatory guidelines to  
36 clarify how the provisions of this chapter may be used in  
37 connection with voluntary local programs for routine and ongoing  
38 agricultural activities adopted pursuant to Article 3.5 (commencing  
39 with Section 2086) and natural community conservation plans  
40 adopted pursuant to Chapter 10 (commencing with Section 2800).

1     2089.23. (a) A landowner that owns land that abuts a property  
2 enrolled in a state safe harbor agreement shall not be required, for  
3 purposes of an incidental take permit, to undertake the management  
4 activities set forth in the state safe harbor agreement, if all of the  
5 following conditions are met:

6     (1) The neighboring landowner allows the department to  
7 determine baseline conditions on the property.

8     (2) The neighboring landowner agrees to maintain the baseline  
9 conditions for the duration specified in the safe harbor agreement.

10    (3) The department determines that allowing the neighboring  
11 landowner to receive an incidental take permit for the abutting  
12 property does not undermine the net conservation benefit  
13 determination made by the department in the approval of the safe  
14 harbor agreement.

15    (4) The take authorized by the department will not jeopardize  
16 the continued existence of the species. This determination shall  
17 be made in accordance with subdivision (c) of Section 2081.

18    (b) (1) Unless the department determines that it is inappropriate  
19 to do so based on the species listed in the permit, or any other  
20 factors, the neighboring landowner shall provide the department  
21 with at least 60 days advance notice of any of the following:

22     (A) Any incidental take that is anticipated to occur under the  
23 permit.

24     (B) The neighboring landowner's plan to return to baseline  
25 conditions.

26     (C) Any plan to transfer or alienate the neighboring landowner's  
27 interest in the land or water.

28    (2) (A) If the department receives any notice described in  
29 paragraph (1), the neighboring landowner shall provide the  
30 department, its contractors, or agents with access to the land or  
31 water for purposes of safely removing or salvaging the species.

32     (B) The department shall provide notice to the neighboring  
33 landowner at least seven days before accessing the land or water  
34 for the purposes of subparagraph (A). The notice shall identify  
35 each person selected by the department, its contractors, or agents  
36 to access the land or water.

37     (C) Notwithstanding subparagraph (B), during the seven-day  
38 notice period, the neighboring landowner may object, in writing,  
39 to a person selected to access the land or water. If the neighboring  
40 landowner objects, another person shall be selected by the

1 department, its contractors, or agents, and notification shall be  
2 provided to the neighboring landowner pursuant to subparagraph  
3 (B). However, if the neighboring landowner objects to a selection  
4 on two successive occasions, the neighboring landowner shall be  
5 deemed to consent to access to the land or water by a person  
6 selected by the department, its contractors, or agents. Failure by  
7 the neighboring landowner to object to the selection within the  
8 seven-day notice period shall be deemed consent to access the land  
9 or water by the person selected by the department, its contractors,  
10 or agents.

11 *2089.24. The department, for informational purposes, shall*  
12 *maintain a list of qualified persons who have worked with the*  
13 *department on an approved agreement, and persons, entities, and*  
14 *organizations serving as program administrators for approved*  
15 *agreements.*

16 ~~2089.24.~~

17 2089.25. The department may promulgate regulations to  
18 implement this article.

19 2089.26. *This article shall remain in effect only until January*  
20 *1, 2020, and as of that date is repealed, unless a later enacted*  
21 *statute, that is enacted before January 1, 2020, deletes or extends*  
22 *that date.*